

ALLEN & OVERY

By ECF

The Honorable Paul G. Gardephe
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August 17, 2023

Re: *Emigrant Bank and Pacific Mercantile Bank v. SunTrust Bank et. al.*, No. 1:20-cv-02391 (PGG)

Dear Judge Gardephe:

We write in our role as co-counsel with Daniels & Tredennick, PLLC, on behalf of Virgo Investment Group LLC (“VIG”), in connection with the subpoena dated May 9, 2023 (the “Virgo Subpoena”)¹ served on VIG by plaintiffs Emigrant Bank (“Emigrant”) and Pacific Mercantile Bank (“PMB,” and together with Emigrant, “Plaintiffs”) in the above-referenced action. Pursuant to Your Honor’s Individual Rule IV. A, we respectfully request a pre-motion conference regarding VIG’s motion for a protective order under Rule 26 of the Federal Rules of Civil Procedure with respect to Request 19 and Request 22 of the Virgo Subpoena.

This request is inextricably related to (i) the request previously submitted to the Court by VIG, Virgo Societas Partnership III (Offshore), L.P., and Virgo Societas Partnership III (Onshore) to the Court on June 11, 2023 [ECF 80], relating to a third-party subpoena to Nu Image, Inc (the “Nu Image Dispute”) and (ii) the request previously submitted to the Court by VIG on July 18, 2023 [ECF 85], relating to a third-party subpoena to Baker Tilly US LLP (the “Baker Tilly Dispute”), both of which were referred to Magistrate Judge Ona T. Wang on July 19, 2023. *See* ECF 88.

This afternoon, counsel for VIG and the Plaintiffs participated in a meet and confer teleconference to discuss the Virgo Subpoena.² During the teleconference, Plaintiffs admitted that they had not completed their review of VIG’s productions to date. VIG suggested a subsequent meet and confer teleconference would be needed once Plaintiffs’ document review was complete, and Plaintiffs agreed.

¹ A copy of the Subpoena is attached hereto as Exhibit 1. Filings made to this action’s docket are referenced as “ECF.”

² The meet and confer teleconference lasted approximately 23 minutes and was attended by Leigha Empson, Sage Vanden Heuvel, Daniel Loud, and Jeff Miller (Quinn Emanuel Urquhart & Sullivan, LLP) for Plaintiffs, and Andrea L Kim and Rebecca Muff Randolph (Daniels & Tredennick, PLLC), and Jacob Herz and Rebecca Ann Cecchini (Allen & Overy LLP) for VIG.

Nevertheless, counsel for Plaintiffs declared an impasse regarding Request 19 and Request 22 of the Virgo Subpoena and suggested that they intended to seek court intervention on those two Requests, despite the fact that the parties continue to discuss, and have not yet reached impasse, on the remaining 20 VIR Subpoena Requests. Counsel for Virgo counseled that seeking court intervention on Requests in a piecemeal fashion is extremely inefficient. Yet, counsel for Plaintiffs stated that they could not “promise” that they would not file piecemeal motions to compel and implied that they intended to seek court intervention on Requests 19 and 22 regardless. To that end, VIR intends to seek a protective order relating to Requests 19 and 22 and seeks a pre-motion conference relating to that motion.

Any motion to compel would represent a waste of resources because the parties have already briefed the issues relevant to the subject disputes. Specifically,

- Request 19 seeks the exact same documents at issue in the Baker Tilly Dispute; and
- Request 22 seeks the exact same documents at issue in the Nu Image Dispute.

As noted, these matters are presently pending before Magistrate Judge Wang. Unfortunately, it appears that the Plaintiffs intend to end-run the existing discovery process with a motion to compel in respect of these Requests prior to resolving all other issues in connection with the VIR Subpoena. In light of the foregoing, we did not want to misuse Your Honor’s time and resources by re-briefing those arguments here. Instead, we submit that the arguments in VIR’s prior pre-motion conference letters regarding the Nu Image Dispute and the Baker Tilly Dispute apply with equal force here. For Your Honor’s convenience, we attach as Exhibits 2 and Exhibit 3 our prior pre-motion conference letters regarding the Nu Image Dispute and the Baker Tilly Dispute respectively.

Respectfully submitted,

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Exhibits.